

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**Nashville, Tennessee**

**June 28, 2002**

**In Re:           Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to  
Declare Unbundled Switching an Unrestricted Unbundled Network Element.**

**Docket No. 02-00207**

---

**INITIAL ORDER RESOLVING DISCOVERY DISPUTES**

---

This matter is before the Hearing Officer, Director Melvin J. Malone, for consideration of the following filings and responses thereto: 1) *UNE-P Coalition's Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support*; 2) *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT*; 3) *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.*; and 4) *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss*.<sup>1</sup>

---

<sup>1</sup> BellSouth makes the following statement in a footnote to two of its filings:

BellSouth acknowledges that the D.C. Circuit Court of Appeals recently remanded the UNE Remand Order to the FCC after rejecting the impairment analysis the FCC adopted in that Order. Accordingly, the most prudent course would be to hold this docket in abeyance until the impairment standard that is to govern these proceedings is ultimately decided in accordance with the D.C. Circuit's opinion.

*BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.*, p. 2 n.3 (Jun. 11, 2002); *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative, Motion to Dismiss*, p. 2 n.4 (Jun. 11, 2002); see also *BellSouth Telecommunications, Inc.'s Response to UNE-P Coalition's Motion to Compel Responses to First Data Requests*, p. 3 n.2 (Jun. 21, 2002) (containing a similar statement). The Hearing Officer will not address this assertion at this time. If BellSouth wishes to pursue this assertion it should do so by filing a motion requesting such relief and properly supporting its request.

## **I. RELEVANT PROCEDURAL HISTORY**

On May 24, 2002, the UNE-P Coalition<sup>2</sup> filed the *UNE-P Coalition First Data Request to BellSouth*. On this same day BellSouth Telecommunications, Inc. (“BellSouth”) filed its first set of discovery requests to NewSouth Communications, Corp.; Adelphia Business Solutions, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; Cinergy Communications; XO Communications, Inc.; Network Telephone Corp.; Business Telecom, Inc.; Electric Power Board of Chattanooga; IDS Telecom, LLC; KMC Telecom, Inc.; Access Integrated Networks, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Z-Tel Communications, Inc.; Xspedius Corp.; Association of Communication Enterprises (“ASCENT”);<sup>3</sup> Momentum Business Solutions, Inc.; AT&T Communications of the South Central States, LLC; and TCG MidSouth, Inc.

On May 31, 2002, BellSouth filed objections to the UNE-P Coalition’s discovery requests. On this same day, Network Telephone Corp. filed a letter asserting objections to BellSouth’s requests. Also on May 31, 2002, ASCENT filed objections to BellSouth’s discovery requests. On June 5, 2002, Business Telecom, Inc., Adelphia Business Solutions, Inc., XO Tennessee, Inc., and the UNE-P Coalition each filed objections to BellSouth’s discovery requests.

On June 4, 2002, the Hearing Officer issued a notice directing that motions to compel be filed by Tuesday, June 11, 2002. The notice further directed that responses to any motions to compel be filed by Tuesday, June 18, 2002. Lastly, the Hearing Officer amended the procedural schedule to

---

<sup>2</sup> The UNE-P Coalition consists of NewSouth Communications, Corp.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; Access Integrated Networks, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Z-Tel Communications, Inc.; and AT&T Communications of the Southeast, Inc.

<sup>3</sup> According to its petition to intervene, ASCENT is a “national industry organization representing more than 500 telecommunications service providers and suppliers throughout the United States.” *Petition to Intervene of the Association of Communications Enterprises*, p. 1 (Mar. 1, 2002).

extend the date for filing and serving responses to discovery requests from Friday, June 21, 2002 to Friday, June 28, 2002.

On June 11, 2002, the UNE-P Coalition filed the *UNE-P Coalition's Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support* requesting the Hearing Officer to compel BellSouth to respond to its requests numbered 1.a, 1.b, 3.a, 3.b, and 5 through 14. Also on June 11, 2002, BellSouth filed three documents: 1) *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT* asserting that ASCENT should respond to its requests numbered 1 through 13; 2) *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.* asserting that the named third parties should be compelled to respond to BellSouth's requests numbered 1 through 8; and 3) *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss* arguing that the UNE-P Coalition should be compelled to respond to BellSouth's requests numbered 1 through 13. Additionally, BellSouth asserted that if the UNE-P Coalition is unwilling to cooperate with discovery then the UNE-P Coalition should be prevented from proceeding with this docket or from presenting evidence of that which they have failed to provide in discovery.

On June 18, 2002, BellSouth and the UNE-P Coalition filed the *Joint Motion to Extend the Deadline to Respond to Motions to Compel*. BellSouth and the UNE-P Coalition requested that the Hearing Officer extend the time for filing responses to the motions to compel from June 18, 2002 to June 21, 2002. Upon finding that good cause existed for the extension, the Hearing Officer extended

the time for filing responses to the motions to compel to June 21, 2002. The Hearing Officer further extended the time for filing responses to discovery requests to July 3, 2002.<sup>4</sup>

On June 20, 2002, ASCENT filed a reply letter to BellSouth's response to ASCENT's objections.<sup>5</sup> ASCENT argued that the Authority should reject BellSouth's arguments and permit ASCENT to continue its participation in this docket.

The UNE-P Coalition filed its opposition to BellSouth's motion to compel or to dismiss on June 21, 2002. The UNE-P Coalition stated that it maintained its objections to request number 7 and that it would respond to BellSouth's discovery request numbers 1, 2, 3, 8, 9, 10, and 11. As to requests numbers 4, 5, 6, 12, and 13, the UNE-P Coalition agreed to provide information, but in each instance qualified either how it would provide the information or the type of information it would provide.

XO Tennessee, Inc. and Business Telecom, Inc. also filed on June 21, 2002 a response to BellSouth's motion to compel. Both parties affirmed their previously asserted objections. Moreover, neither party agreed to respond to any of the discovery requests, but XO Tennessee, Inc. did suggest alternatives through which the Authority could obtain the information.

Also on June 21, 2002, BellSouth filed a response to the UNE-P Coalition's motion to compel. As to request numbers 1, 3, and 10, BellSouth stated that it would provide the information it maintains. BellSouth affirmed its objections to request numbers 5 through 9, and its objection to request number 14 pending clarification of the term "churn rate" by the UNE-P Coalition. BellSouth withdrew its objections to request numbers 11, 12, and 13.

---

<sup>4</sup> *Order Granting Extension*, pp. 1-2 (Jun. 19, 2002).

<sup>5</sup> The filing stamped June 20, 2002 was received via facsimile. The original filing was received and stamped filed on June 24, 2002.

## II. FINDINGS AND CONCLUSIONS

TRA Rule 1220-1-2-.11 requires that discovery in contested cases before the agency be “effectuated in accordance with the Tennessee Rules of Civil Procedure.”<sup>6</sup> In general, the scope of discovery in Tennessee is broad.<sup>7</sup> Rule 26.02(1) of the Tennessee Rules of Civil Procedure permits parties to obtain any information that is relevant and not privileged.<sup>8</sup> There are, however, possible limitations. Specifically, Rule 26.02(1) permits limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome.<sup>9</sup>

Parties may choose from a variety of tools when effectuating discovery. Rule 33.01 permits parties to serve written interrogatories.<sup>10</sup> Also, Rule 34.01 permits parties to serve requests to produce and permit inspection of documents.<sup>11</sup> In both instances, a party that chooses not to respond to a request may object by stating the reasons for the objection.<sup>12</sup>

The resolution of disputes regarding discovery limitations is within the discretion of the decisionmaker.<sup>13</sup> The decisionmaker must view disputes “in the context of the issues being tried and the posture of the case at the time the request for discovery is made.”<sup>14</sup> Additionally, the

---

<sup>6</sup> Tenn. Comp. R. & Regs. 1220-1-2-.11(1) (Rev. Mar. 2002).

<sup>7</sup> *Duncan v. Duncan*, 789 S.W.2d 557, 560 (Tenn. Ct. App. 1990); *Vythoulkas v. Vanderbilt Univ. Hosp.*, 693 S.W.2d 350, 357 (Tenn. Ct. App. 1985).

<sup>8</sup> Tenn. Ct. Rules Ann., Tenn. R. Civ. P. 26.02(1) (Vol. 1 2001).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* 33.01.

<sup>11</sup> *Id.* 34.01.

<sup>12</sup> *Id.* 33.01 (providing: “Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the **reasons** for objection shall be stated in lieu of an answer.” (emphasis added)); *Id.* 34.02 (providing: “The response shall state . . . that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the **reasons** for objection shall be stated.” (emphasis added)).

<sup>13</sup> *Roberts v. Blount Mem’l Hosp.*, 963 S.W.2d 744, 747 (Tenn. Ct. App. 1997); *Duncan*, 789 S.W.2d at 560-61; *Price v. Mercury Supply, Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984).

<sup>14</sup> *Price*, 682 S.W.2d at 935.

decisionmaker “should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request.”<sup>15</sup>

Based on these rules and the related case law, the Hearing Officer makes the following findings and conclusions.

**A. *UNE-P Coalition’s Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support***

**UNE-P Coalition’s Request Nos. 5 through 9:**

5. Provide all documents used to obtain management approval for the “BellSouth Connect and Grow Promotion” (i.e., BellSouth’s promotion that required the customer to upgrade to a four-line package).
6. Provide all documents used to train sales and/or marketing personnel, including sales scripts, that describe or address the “BellSouth Connect and Grow Promotion.”
7. Identify all terms and conditions, discounts and prices the comprised the “BellSouth Connect and Grow Promotion.”
8. Please supply all tariff references (and copies of relevant tariff pages) that described the “BellSouth Connect and Grow Promotion.” If this promotion was not tariffed, why was it not a tariffed offering?
9. With respect to the “BellSouth Connect and Grow Promotion” in Tennessee:
  - a. When was the BellSouth Connect and Grow Promotion offered in Tennessee?
  - b. How many customers subscribed to the BellSouth Connect and Grow Promotion in Tennessee?
  - c. Does BellSouth still offer the BellSouth Connect and Grow Promotion in Tennessee?

BellSouth objects to request numbers 5 through 9 on the grounds that the requested information is not relevant and the request is not reasonably calculated to lead to the discovery of admissible evidence.<sup>16</sup> In its motion to compel, the UNE-P Coalition argues that information related to the BellSouth Connect and Grow Promotion may demonstrate “one important way in which

---

<sup>15</sup> *Duncan*, 789 S.W.2d at 561.

<sup>16</sup> *BellSouth Telecommunications, Inc.’s Objections to UNE-P Coalition’s First Set of Data Requests*, pp. 5-6 (May 31, 2002).

limiting the availability of UNE-P in the Nashville MSA to end users with one to three lines distorts competition.”<sup>17</sup> BellSouth contends that the impairment analysis that is the subject of this docket involves consideration of the following factors: cost, effect on timeliness of entry, quality, ubiquity, and impact on network operations. In addition, the analysis also includes, according to BellSouth, consideration of the rapid introduction of competition in all markets, promotion of facilities-based competition, investment and innovation, reduction of regulatory obligations, promotion of certainty in the market, and administrative practicality.<sup>18</sup> BellSouth asserts that request numbers 5 through 9 are not relevant to these factors.<sup>19</sup>

Section 251(d)(2)(B) prescribes the standard for the Federal Communications Commission (“FCC”) to follow when determining whether an Incumbent Local Exchange Carrier (“ILEC”) must unbundle a non-proprietary network element. This section provides that the FCC shall: “consider, **at a minimum**, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>20</sup> Relying on the “at a minimum” language of Section 251(d)(2), the FCC prescribed five additional factors that may be considered when applying the impair analysis.<sup>21</sup> These are: 1) “how

---

<sup>17</sup> *UNE-P Coalition’s Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support*, p. 4 (Jun. 11, 2002).

<sup>18</sup> *BellSouth Telecommunications, Inc.’s Response to UNE-P Coalition’s Motion to Compel Responses to First Data Requests*, pp. 2-3 (Jun. 21, 2002).

<sup>19</sup> *Id.* at 3-4.

<sup>20</sup> 47 U.S.C.A. § 251(d)(2)(B) (Supp. 2001) (emphasis added). For the purpose of this analysis, the Hearing Officer will assume that subsection (A) does not apply because there has been no contention to date that that the element at issue is proprietary and the parties’ arguments on this issue have focused only on the impairment analysis contained in subsection (B).

<sup>21</sup> *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, para. 101 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Proposed Rulemaking) (hereinafter *UNE Remand Order*), remanded by *United States Telecom Ass’n. v. FCC*, 290 F.3d. 415 (D.C. Cir. 2002). The decision of the DC Circuit does not criticize the FCC’s interpretation of the impair standard. Instead, the Court disagrees with the manner in which the FCC applied the standard. *United States Telecom Ass’n. v. FCC*, 290 F.3d. 415, 421-28 (D.C. Cir. 2002).

access to specific unbundled network elements will encourage the rapid introduction of local competition to the benefit of the greatest number of consumers”; 2) promotion of “facilities-based competition by competitive LECs”; 3) reduction of “regulatory obligations to provide access to network elements as alternatives to the incumbent LECs’ network elements”; 4) providing “certainty in the market so that competitive LECs can attract investment capital and execute their business plans”; and 5) creating unbundling rules that are “administratively manageable for the Commission and the states to apply.”<sup>22</sup>

The Hearing Officer finds that the requested information is relevant or likely to lead to the discovery of admissible evidence. Specifically, the information relates to factor one above, the rapid introduction of competition for a broad base of consumers. The manner in which BellSouth markets its services in light of the current unbundling exception has the potential to affect the speed and scope of the development of competition in Tennessee. Thus, consideration of evidence of such marketing activities may prove helpful in resolving the issues in this docket.

**UNE-P Coalition’s Request No. 14:**

In 2001, what was BellSouth’s churn rate in Tennessee for (1) residential customers, (2) single-line business customers, and (3) business customers with between two and 24 voice lines, inclusive.

BellSouth objects to this request on the grounds that the requested information is not relevant and the request is not reasonably calculated to lead to the discovery of admissible evidence.<sup>23</sup> The UNE-P Coalition argues that information related to churn rates is relevant in that it relates to the profitability of competing local exchange carriers (“CLECs”) serving customers with their own

---

<sup>22</sup> *UNE Remand Order*, 15 F.C.C.R. 3696, paras. 103-05.

<sup>23</sup> *BellSouth Telecommunications, Inc.’s Objections to UNE-P Coalition’s First Set of Data Requests*, p. 8 (May 31, 2002).



switches.<sup>24</sup> In its response to the UNE-P Coalition's motion to compel, BellSouth asserts that it is unclear on the intended definition of churn rate. Pending a response from the UNE-P Coalition to BellSouth's request for clarification of the definition, BellSouth maintains its relevancy objections.<sup>25</sup>

The Hearing Officer finds that a ruling on this portion of the motion to compel should be held in abeyance pending the resolution of BellSouth's request for clarification. An alternative that may allow the parties to resolve this matter without agency intervention would be for the UNE-P Coalition to rephrase its request to obtain the specific data needed for it to calculate the churn rate. The parties shall notify the Authority of the status of this discovery dispute by 12:00 p.m., Tuesday, July 2, 2002.

**B. *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT***

BellSouth issued thirteen (13) data requests to ASCENT on May 24, 2002. On May 31, 2002, ASCENT responded by filing general objections as to all requests. In addition, ASCENT provided the following specific response to each request: "Without waiver of the foregoing objection, ASCENT responds that it is a trade organization that does not track or have custody of the information requested."<sup>26</sup> Rather than file a motion to compel, BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT*. In this filing, BellSouth states:

BellSouth files this objection in lieu of a motion to compel as it is clear that ASCENT cannot produce what it does not possess or control. BellSouth wishes to make clear that for the record, however, that ASCENT should not be permitted to submit briefs or comments in this docket purporting to discuss issues regarding which it has either declined to provide discovery or as to which its discovery

---

<sup>24</sup> *UNE-P Coalition's Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support*, p. 6 (Jun. 11, 2002).

<sup>25</sup> *BellSouth Telecommunications, Inc.'s Response to UNE-P Coalition's Motion to Compel Responses to First Data Requests*, p. 4 (Jun. 21, 2002).

<sup>26</sup> See, e.g., *Objections of the Association of Communications Enterprises to BellSouth Telecommunications, Inc.'s First Set of Discovery Requests*, p. 2 (May 31, 2002).

responses indicate it has no factual knowledge. For these reasons BellSouth respectfully requests that the Hearing Officer prohibit ASCENT from presenting testimony in this docket without first responding to BellSouth's discovery.<sup>27</sup>

ASCENT filed a letter replying to BellSouth's response. In its letter, ASCENT contends that BellSouth's objections should be overruled and ASCENT should be permitted to continue its participation in this docket. ASCENT asserts that it "does not need specific member data to understand general member concerns and interests, and defend those concerns, accordingly."<sup>28</sup> ASCENT further asserts that as a party it may comment on evidence filed by other parties.<sup>29</sup>

The Hearing Officer finds that ASCENT should respond to those discovery requests that seek information on the make-up of the organization or information on the organization's position as a party, but should not be compelled to respond to questions seeking particular member positions or data. ASCENT itself acknowledges that it is in this docket to defend the general concerns and interest of its members, and, therefore, ASCENT should respond to requests related to those concerns and interests. Based on these findings, the Hearing Officer finds that ASCENT should respond to discovery requests number 1 to the extent it asks ASCENT to identify its members, request numbers 7 and 12 to the extent that each inquires as to ASCENT's contentions in this docket and requests the facts and documents supporting those contentions; and request number 13 to the extent that it relates to request numbers 1, 7, and 12.

ASCENT should not be required to respond to the remaining requests particularly in light of the fact that BellSouth acknowledges that ASCENT cannot provide that which it does not possess. Nevertheless, ASCENT should be prohibited from presenting any evidence or testimony in this

---

<sup>27</sup> *BellSouth Telecommunications, Inc.'s Response to Objections Raised by ASCENT*, p. 2 (Jun. 11, 2002).

<sup>28</sup> Letter of Andrew O. Isar, Director – State Affairs, dated June 20, 2002 (Jun. 20, 2002).

<sup>29</sup> *Id.*

docket that would have been responsive to the discovery requests for which ASCENT contends that it does not maintain information.

**C. *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.***

BellSouth sent the following eight discovery requests to Network Telephone Corp., Business Telecom, Inc., Adelphia Business Solutions, Inc.,<sup>30</sup> and XO Tennessee, Inc.<sup>31</sup> (collectively "Third Parties"):

1. Please identify each switch that you own or operate to provide telecommunications service in the State of Tennessee, including, but not limited to, switches outside Tennessee. In answering this request, please describe with particularity for each such switch:

- (a) the specific location of the switch;
- (b) the type of switch that has been deployed (e.g., circuit, wireless, packet, etc.);
- (c) the functions and capabilities of the switch;
- (d) the geographic area served by the switch;
- (e) the total number of access lines or equivalent lines the switch is capable of serving; and
- (f) the total number of access lines or equivalent lines the switch is currently serving.

2. For each switch identified in the foregoing discovery request, please provide a detailed breakdown of the costs incurred in deploying that switch as well as a complete description of these costs.

3. Please state the total number of switching points of interface you have deployed in the State of Tennessee for the collection of traffic and identify the location each such switching point of interface.

4. Please identify all carriers that have purchased switching from you in Tennessee.

5. Please identify all carriers that have made inquiries to you regarding purchasing switching from you in Tennessee.

6. Please identify carriers other than BellSouth, of which you are aware, that offer switching in Tennessee.

7. Is it your contention that your ability to provide local exchange service to customers in Tennessee via your own switch has been impeded by a lack of

<sup>30</sup> BellSouth's actual filing did not include the incorporation abbreviation. *BellSouth Telecommunications, Inc.'s First Set of Discovery Requests to Adelphia Business Solutions* (May 24, 2002).

<sup>31</sup> BellSouth's actual filing referred to this entity as XO Communications, Inc. *BellSouth Telecommunications, Inc.'s First Set of Discovery Requests to XO Communications, Inc.* (May 24, 2002).

collocation space in BellSouth central offices? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.

8. Please produce any and all documents referred to or identified in response to BellSouth's Discovery Requests.

On May 31, 2002, Network Telephone Corp. filed a letter objecting to the data requests on the grounds that it is not a party to the docket and, therefore, will not receive the protections afforded parties. Network Telephone Corp. also asserts that the requested information might contain competitively sensitive information.<sup>32</sup>

On June 5, 2002, Business Telecom, Inc. objected also asserting that it is not a party to the docket and that the requested information is proprietary. Business Telecom, Inc. also objects on the ground that responding to the requests would be unduly burdensome.<sup>33</sup>

Adelphia Business Solutions, Inc. filed objections on June 5, 2002. It asserts that "Adelphia Business Solutions" is not an actual entity, a party to this docket or certificated in Tennessee, but that Adelphia Business Solutions of Nashville, L.P. ("ABS Nashville") is certificated in Tennessee.<sup>34</sup> Thereafter, Adelphia Business Solutions, Inc. asserts objections on behalf of ABS Nashville in the event BellSouth meant to direct the discovery requests to ABS Nashville. Generally, ABS Nashville asserts that responding to the requests is unduly burdensome and that the information requested is not relevant or likely to lead to the discovery of relevant information. Further, ABS Nashville contends the requested information is proprietary.<sup>35</sup> Specifically, ABS Nashville explains that responding to discovery would be unduly burdensome given that its parent company Adelphia Business Solutions, Inc. is operating under Debtor-in-Possession financing under the supervision of

---

<sup>32</sup> Letter of Brent E. McMahan, Vice President – Regulatory & Governmental Affairs, dated May 30, 2002 (May 31, 2002).

<sup>33</sup> Letter of Charles B. Welch, Jr., Counsel for Business Telecom, Inc., dated June 5, 2002 (Jun. 5, 2002).

<sup>34</sup> *Response to BellSouth Telecommunications, Inc.'s First Set of Discovery to Adelphia Business Solutions*, p.1 (Jun. 5, 2002).

<sup>35</sup> *Id.*

the Bankruptcy Court for the Southern District of New York.<sup>36</sup> Lastly, ABS Nashville argues that information regarding its switches is not relevant or likely to lead to relevant information regarding whether BellSouth should be required to provide unbundled switching.<sup>37</sup>

Also on June 5, 2002, XO Tennessee, Inc. filed objections. As with the other third parties, XO Tennessee, Inc. argued that it is not a party, the information is confidential, and that XO Tennessee, Inc., as a non-party, is not protected by a proprietary agreement in this docket. XO Tennessee, Inc., however, recognized that the Authority has the statutory power to collect information from regulated carriers.<sup>38</sup>

BellSouth responded to the objections of the Third Parties by filing *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests from Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.* on June 11, 2002. BellSouth asserts that it submitted the discovery requests to the Third Parties pursuant to the following statement in the Hearing Officer's *First Report and Recommendation*:

Discovery requests intended solely to aid the Authority in this fact-finding process may also be served upon any Tennessee-certificated facilities-based competing service providers and shall be answered within the time frame established herein. Although the Authority may employ other means to gather the requisite information, permitting discovery may be the most expedient.<sup>39</sup>

BellSouth also argues that the information requested will aid the Authority in applying the impairment analysis as interpreted by the FCC.<sup>40</sup> BellSouth further argues that if the Authority sustains the Third Parties' objections, the Authority should issue BellSouth's requests in the form of

---

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Objections of XO Tennessee, Inc. to Data Requests of BellSouth Telecommunications, Inc.*, p. 1 (Jun. 5, 2002).

<sup>39</sup> *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests from Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.*, p. 1-2 (Jun. 11, 2002) (quoting *First Report and Recommendation*, p. 7 n.26 (May 13, 2002)).

<sup>40</sup> *Id.* at 2.

data requests or modify the procedural schedule to allow BellSouth an opportunity to issue subpoenas.<sup>41</sup>

On June 21, 2002, XO Tennessee, Inc. and Business Telecom, Inc. filed responses to BellSouth's motion to compel. Business Telecom restates its contention that it is not a party to the docket or the protective order. Business Telecom, Inc. contends that the footnote in the *First Report and Recommendation* did not suspend the rules of discovery.<sup>42</sup> Additionally, Business Telecom, Inc. states that its filing of a response does not constitute a notice of appearance.<sup>43</sup> XO Tennessee, Inc. reiterates that it is not a party and discovery upon it is not permissible. XO Tennessee, Inc. also contends that the Authority may not delegate its power to obtain information to a private entity, although it does recognize that the Authority may obtain the information.<sup>44</sup> If the Authority determines that it needs the information, XO Tennessee, Inc. requests that the Authority permit XO Tennessee, Inc. or any other responding carrier to delete its name from the response or that the Authority distribute the information to the parties in an aggregate form.<sup>45</sup>

BellSouth correctly quotes the *First Report and Recommendation*, but fails to recognize the context in which the statement was made. The primary focus of the *First Report and Recommendation* was the recommendation that the Authority accept the *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element* as a petition for a rule thereby transforming the previously convened contested case into a rulemaking proceeding.<sup>46</sup> Subsequent to the filing of the *First Report and*

---

<sup>41</sup> *Id.* at 3.

<sup>42</sup> Letter of Charles B. Welch, Jr., Counsel for Business Telecom, Inc., dated June 21, 2002, p. 1 (Jun. 21, 2002).

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Response of XO Tennessee, Inc. to Motion to Compel*, p. 1 (Jun. 21, 2002).

<sup>45</sup> *Id.* at 1-2.

<sup>46</sup> *First Report and Recommendation*, p. 7 (May 13, 2002).

*Recommendation* the UNE-P Coalition filed a *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*. At an Authority Conference on May 21, 2002, the Directors voted to allow BellSouth until May 28, 2002, to respond to the UNE-P Coalition's motion and to allow the UNE-P Coalition until May 30, 2002, to submit a reply to BellSouth's response. The Directors also voted to direct the Hearing Officer to resolve the motion and to adopt that portion of the procedural schedule in the *First Report and Recommendation* pertaining to the filing of discovery and a protective order. The order memorializing these decisions set forth the relevant portions of the procedural schedule, but did not include the Hearing Officer's footnote quoted by BellSouth.<sup>47</sup>

The Hearing Officer issued an order on May 29, 2002, disposing of the UNE-P Coalition's motion to amend and reconsider. The Hearing Officer granted the UNE-P Coalition's motion to amend and determined that the docket should proceed as a contested case.<sup>48</sup> Thereafter, the Hearing Officer set out a procedural schedule through completion of the docket. Consistent with the earlier decision of the Directors at the May 21, 2002 Authority Conference, the Hearing Officer did not include language permitting the issuance of discovery to non-parties. Given this history, it is clear that the discussion related to issuing discovery to non-parties was limited to the recommendation that this docket proceed as a rulemaking. Therefore, reliance on the footnote in the *First Report and Recommendation* is misplaced, albeit understandably.

Although the discovery requests submitted by BellSouth were issued in good faith, the Hearing Officer concludes that BellSouth's motion to compel should be denied. Instead, the Authority should promulgate data requests to issue to Network Telephone Corp., Business Telecom,

---

<sup>47</sup> *Order Adopting First Report and Recommendation in Part*, p. 2 (Jun. 17, 2002).

Inc., XO Tennessee, Inc., ABS Nashville, and any other CLEC which the Authority determines should respond. Further, in responding to the data requests, a non-party shall file a Proprietary Version of its response with the Authority as well as a Redacted Version. The Proprietary Version shall be filed in a sealed envelope, shall contain on the outside of the envelope a designation that the information is protected pursuant to the terms of this order, shall be maintained in the Office of the Executive Secretary, and shall be available only to members of the Authority. In the Redacted Version, the non-party may redact only its name and any other identifying information such as its address, phone number, and attorney. The Redacted Version shall be filed in the Office of the Executive Secretary and shall be served on all parties to this docket.

**D. *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss***

**BellSouth's Request to UNE-P Coalition Nos. 4 through 6:**

4. Please state the total number of residential access lines or equivalent lines for which you currently provide local exchange service in Tennessee. In answering this discovery request, please state:

(a) the number of residential access lines or equivalent lines that you currently serve in Tennessee that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA;

(b) the number of residential access lines or equivalent lines that you currently serve in Tennessee using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth; and

(c) the number of residential access lines or equivalent lines that you currently serve in the "density zone 1" central offices in the Nashville MSA using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

---

<sup>48</sup> Initial Order Granting Motion to Amend Petition and to Reconsider First Report and Recommendation, p. 4 (May 29, 2002).



5. Please state the total number of business access lines or equivalent lines for which you currently provide local exchange service in Tennessee. In answering this discovery request, please state:

(a) the number of business lines or equivalent lines that you currently serve in Tennessee that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA;

(b) the number of business access lines or equivalent lines that you currently serve in Tennessee using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth; and

(c) the number of business access lines or equivalent lines that you currently serve in the "density zone 1" central offices in the Nashville MSA using: (i) UNE-P purchased from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

6. Do you currently provide local exchange service to end-user customers in Tennessee with four or more voice grade (DSO) equivalents or lines? If the answer to this discovery request is in the affirmative, please state:

(a) the total number of end-user customers with four or more voice grade (DSO) equivalent or lines currently served by you;

(b) the total number of end-user customers with four or more voice grade (DSO) equivalents or lines currently served by you that are located: (i) in the "density zone 1" central offices in the Nashville Metropolitan Statistical Area ("MSA"); and (ii) in the Nashville MSA; and (iii) outside the Nashville MSA; and

(c) the total number of end-users customer with four or more voice grade (DSO) equivalents or lines currently served by you using: (i) facilities purchased exclusively from BellSouth; (ii) resold telecommunications services from BellSouth; (iii) your own facilities; and (iv) your own facilities in conjunction with facilities purchased from BellSouth or a carrier other than BellSouth.

The UNE-P Coalition argues that these requests are vague, overly broad, unduly burdensome, and not relevant. Further, to the extent that BellSouth seeks CLEC-specific information, the UNE-P Coalition objects to providing trade secrets or proprietary information.<sup>49</sup> In its motion to compel, BellSouth submits that its requests are clear and that the UNE-P Coalition failed to justify its contention that the requests are unduly burdensome. BellSouth also asserts that the UNE-P Coalition's objections based on trade secrets and confidentiality are without merit given their

agreement to a protective order in this docket.<sup>50</sup> BellSouth argues that the information requested is relevant because it relates to CLECs' ability to provide service using UNE-P purchased from BellSouth.<sup>51</sup> In response to BellSouth's motion to compel, the UNE-P Coalition agreed to provide aggregate information, but stated that it would not provide individual CLEC information due to the "extreme competitive sensitivity of the requested information."<sup>52</sup>

The *Protective Order* entered in this docket provides: "Nothing in this Order shall prevent any party from asserting any objection to discovery other than an objection based upon grounds of confidentiality."<sup>53</sup> Further, the *Protective Order* defines proprietary or confidential information as including documents and information deemed to contain or constitute "trade secrets" or "other commercially sensitive information."<sup>54</sup> Counsel for the UNE-P Coalition signed the *Protective Order*. Having failed to otherwise negotiate the language of the *Protective Order*, the UNE-P Coalition is bound thereby. Therefore, the UNE-P Coalition's refusal to provide the information as requested by BellSouth on the grounds that the information is confidential cannot be sustained. Hence, the UNE-P Coalition should respond to BellSouth's request numbers 4 through 6 as issued.

---

<sup>49</sup> *Objections of the UNE-P Coalition to Data Requests of BellSouth Telecommunications, Inc.*, pp. 5-6 (Jun. 5, 2002).

<sup>50</sup> *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss*, pp.1-3 (Jun, 11, 2002).

<sup>51</sup> *Id.* at 7-10.

<sup>52</sup> *UNE-P Coalition's Opposition to BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Requests or, in the Alternative, Motion to Dismiss*, p. 2 (Jun. 21, 2002).

<sup>53</sup> *Protective Order*, p. 7 (Jun. 19, 2002).

<sup>54</sup> *Id.* at 1.

**BellSouth Request to UNE-P Coalition No. 7:**

Is it your contention that the Unbundled Local Switching Exemption has prevented you from competing or otherwise made it more difficult for you to compete in the local exchange market in Tennessee? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.<sup>55</sup>

The UNE-P Coalition argues that this request is vague, overly broad, unduly burdensome, and not relevant and objects to providing trade secrets or proprietary information. The UNE-P Coalition asserts that it has filed and will file as part of its pre-filed testimony information supporting its position.<sup>56</sup> In its motion to compel, BellSouth submits that its requests are clear and that the UNE-P Coalition failed to justify its contention that the requests are unduly burdensome. BellSouth also asserts that the UNE-P Coalition's objections based on trade secrets and confidentiality are without merit given their agreement to a protective order in this case.<sup>57</sup> BellSouth asserts that the requested information is relevant given that the "central contention" in this docket is "whether the TRA can or should depart from the FCC unbundled local switching exemption."<sup>58</sup> Moreover, BellSouth submits that the UNE-P Coalition's assertion that it will support its position in pre-filed testimony is not a sufficient response to discovery.<sup>59</sup> In response to BellSouth's motion to compel, the UNE-P Coalition affirms its contentions that it will provide support for its position as part of its testimony and that the request is overly burdensome. Although the UNE-P Coalition acknowledges that BellSouth may request that the UNE-P Coalition provide the specific facts upon which it relies

---

<sup>55</sup> This is request number 11 in the requests sent to Birch Telecom of the South, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; and Access Integrated Networks, Inc.

<sup>56</sup> *Objections of the UNE-P Coalition to Data Requests of BellSouth Telecommunications, Inc.*, pp. 6-7 (Jun. 5, 2002).

<sup>57</sup> *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss*, pp.1-3 (Jun, 11, 2002).

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Id.*

in support of its position, it contends that it would be unable to provide all documentation upon which it will rely until after discovery is complete.<sup>60</sup>

The Hearing Officer finds that the UNE-P Coalition has failed to establish that the request is vague, overly broad, unduly burdensome, and not relevant. In addition, as previously determined an objection based on confidentiality is inappropriate pursuant to the terms of the *Protective Order*.<sup>61</sup> Moreover, it is only reasonable to conclude that the request seeks information currently in the possession of the respondent. Therefore, the Hearing Officer finds that the UNE-P Coalition should respond to request number 7 to the best of its ability as of the date of the response and supplement its response as necessary in accordance with Rule 26.05 of the Tennessee Rules of Civil Procedure.

**BellSouth Request to UNE-P Coalition No. 12:**

Is it your contention that your ability to provide local exchange service to customers in Tennessee via your own switch has been impeded by a lack of collocation space in BellSouth central offices? If the answer is in the affirmative, please state all facts and identify all documents that support this contention.

The UNE-P Coalition argues that this request is vague, overly broad, unduly burdensome, and not relevant and objects to providing trade secrets or proprietary information. The UNE-P Coalition also contends that “the requested information is in the possession of BST and can be found in [BellSouth’s] space management reports which [BellSouth] is required by Federal Communications Commission rules to produce and maintain in its possession.”<sup>62</sup> In its motion to compel, BellSouth submits that its requests are clear and that the UNE-P Coalition failed to justify its contention that the requests are unduly burdensome. BellSouth also asserts that the UNE-P Coalition’s objections based on trade secrets and confidentiality are without merit given their

---

<sup>60</sup> *UNE-P Coalition’s Opposition to BellSouth Telecommunications, Inc.’s Motion to Compel Responses to Requests or, in the Alternative, Motion to Dismiss*, pp. 2-3 (Jun. 21, 2002).

<sup>61</sup> *See supra* p. 18.

<sup>62</sup> *Objections of the UNE-P Coalition to Data Requests of BellSouth Telecommunications, Inc.*, p. 8 (Jun. 5, 2002).

agreement to a protective order in this case.<sup>63</sup> BellSouth argues that the UNE-P Coalition's objection does not address the request to the extent it asks whether it is the contention of the UNE-P Coalition. Further, BellSouth claims that the request is intended to narrow the issues in this docket.<sup>64</sup> In response to BellSouth's motion to compel, the UNE-P Coalition agreed to provide aggregate information, but stated that it would not provide individual CLEC information due to the "extreme competitive sensitivity of the information."<sup>65</sup>

The Hearing Officer finds that the UNE-P Coalition has failed to establish that the request is vague, overly broad, unduly burdensome, and not relevant. In addition, as previously determined an objection based on confidentiality is inappropriate pursuant to the terms of the *Protective Order*.<sup>66</sup> Therefore, the Hearing Officer finds that the UNE-P Coalition should respond to request number 12 with individual CLEC information.

**BellSouth Request to UNE-P Coalition No. 13:**

Please produce any and all documents referred to or identified in response to BellSouth's Discovery Requests.

The UNE-P Coalition did not specifically object to this request in its June 5, 2002 filing. In its general objections applying to all requests, the UNE-P Coalition asserts that it objects to providing any privileged information, information not within its control, requests that are overly broad, requests that seek irrelevant information, requests that will cause undue burden, requests that are vague, requests that are unreasonably cumulative, requests that seek disclosure of proprietary information, and requests that call for conclusions of law.<sup>67</sup> In its motion to compel, BellSouth

---

<sup>63</sup> *BellSouth Telecommunications, Inc. 's Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss*, pp.1-3 (Jun. 11, 2002).

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *UNE-P Coalition's Opposition to BellSouth Telecommunications, Inc. 's Motion to Compel Responses to Requests or, in the Alternative, Motion to Dismiss*, p. 4 (Jun. 21, 2002).

<sup>66</sup> *See supra* p. 18.

<sup>67</sup> *Objections of the UNE-P Coalition to Data Requests of BellSouth Telecommunications, Inc.*, pp. 1-2 (Jun. 5, 2002).

argues that the request is designed to determine the breadth of the UNE-P Coalition's contentions and to narrow the issues. BellSouth argues that it is entitled to discover the basis for the UNE-P Coalition's contentions.<sup>68</sup> In response to BellSouth's motion to compel, the UNE-P Coalition argued that discovery request number 13 is overly broad, but stated that it would respond by providing the relevant documents unless such documents are public or BellSouth documents.<sup>69</sup>

The Hearing Officer finds that in order to provide a complete response, the UNE-P Coalition must provide any non-public or non-BellSouth documents and identify any public or BellSouth documents. Such identification shall contain information sufficient to allow BellSouth to locate the document.

**IT IS THEREFORE ORDERED THAT:**

1. The *UNE-P Coalition's Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support* is granted such that BellSouth Telecommunications, Inc. shall respond to UNE-P Coalition request numbers 5 through 9.
2. The *UNE-P Coalition's Motion to Compel Responses to First Data Request to BellSouth Telecommunications, Inc. and Memorandum in Support* as to request number 14 shall be held in abeyance pending the resolution of BellSouth Telecommunications Inc.'s request for clarification. The parties shall notify the Authority of the status of this discovery dispute by 12:00 p.m., Tuesday, July 2, 2002.
3. The Association of Communication Enterprises shall respond to discovery request number 1 to the extent it asks the Association of Communication Enterprises to identify its members, request numbers 7 and 12 to the extent that each inquires as to Association of Communication

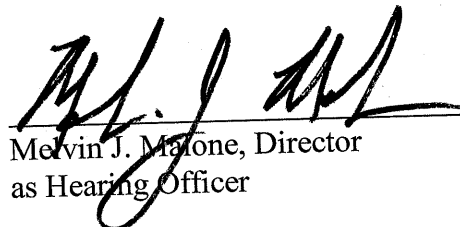
---

<sup>68</sup> *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss*, p. 15 (Jun, 11, 2002).

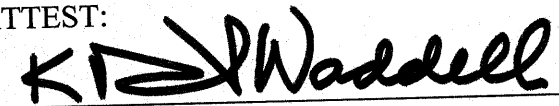
Enterprises' contentions in this docket and requests the facts and documents supporting those contentions; and request number 13 to the extent that it relates to request numbers 1, 7, and 12. The Association of Communication Enterprises shall not present any evidence or testimony in this docket that would have been responsive to the discovery requests for which the Association of Communication Enterprises contends that it does not maintain information.

4. *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests from Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.* is denied. The Authority shall promulgate data requests to issue to Network Telephone Corp., Business Telecom, Inc., XO Tennessee, Inc., Adelphia Business Solutions of Nashville, L.P., and any other CLEC which the Authority determines should respond. Responses to the data requests shall be filed as provided for herein.

5. *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests or, in the Alternative Motion to Dismiss* is granted to the extent that the UNE-P Coalition shall respond to request numbers 4, 5, 6, 7, 12, and 13 as provided for herein.

  
Melvin J. Malone, Director  
as Hearing Officer

ATTEST:

  
K. David Waddell, Executive Secretary

---

<sup>69</sup> *UNE-P Coalition's Opposition to BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Requests or, in the Alternative, Motion to Dismiss*, p. 4 (Jun. 21, 2002).